

No. 14330.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACE TRACTOR & EQUIPMENT Co., INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP Co., INC.,

Appellee.

REPLY BRIEF OF APPELLANT.

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It will serve no useful purpose in this reply brief to restate or reargue in detail whether the deposition testimony supports the findings of the District Court. We will, however, discuss briefly some of the salient points of appellee's brief.

I.

The Accusatory Letters.

Considerable reliance is placed by appellee upon a letter addressed by Messrs. Bogle, Bogle & Gates, dated March 22, 1949, to Ace Tractor & Equipment Co., Inc. [Libellant's Ex. 4], and the accusatory statements contained therein. It is interesting to note that this accusatory letter states that the "gear and riggings supplied by the ship for your use was in perfect condition" and that the

accident “was caused by . . . the negligence of a young and inexperienced winch driver employed by you. . . .” There is no claim that the steel strap which parted was in anywise defective. The record shows that this letter was appropriately answered by the attorneys for Ace Tractor & Equipment Co., Inc., in their reply to Messrs. Bogle, Bogle & Gates, dated May 20, 1949 [Libelant’s Ex. 5].

With respect to the failure of respondent to reply to Bogle, Bogle & Gates’ second accusatory letter dated December 10, 1949 [Libelant’s Ex. 6], it is respectfully submitted that no reply need have been made in view of the earlier rejection of the claim [Libelant’s Ex. 5]. Indeed it is strange that Messrs. Bogle, Bogle & Gates persisted in communicating directly with Ace Tractor & Equipment Co., Inc., after having been apprised more than seven months previously that appellant was then represented by counsel, Messrs. Parker, Stanbury & Reese.

II.

The Strap Was Not Unseaworthy.

There is no question but that the strap parted. The only positive testimony as to the physical condition of the strap was contained in the testimony of the master, Gerald Reilly, who stated: “Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell it had been used. They get kinky” [R. 126]. Obviously, if the strap was cut or subjected to excessive strain it would part, even if it were new and in good condition. The mere parting does not support the finding that it was an unseaworthy appliance.

III.

The Winch-driver's Competency.

Appellee, faced with inability to demonstrate by positive testimony the alleged incompetence of the winch driver, again relies upon inferences sought to be drawn from the accusatory letters of Messrs. Bogle, Bogle & Gates. The fact remains that this winch driver had been operating the gear for some days previous to the casualty and there is no showing aside from the episode which caused the injury to Mr. Calvin Sides which can in anywise be construed as evidencing incompetency. It is submitted that there is no testimony in the record which shows unequivocally how or what caused the parting of the strap.

Conclusion.

The record clearly fails to establish facts sufficient to support a judgment in the first instance in favor of the injured seaman against Olympic and it further fails to eliminate the possibility that Olympic might not have been equally responsible with Ace for said injury. The judgment should be reversed.

Respectfully submitted,

LILLICK, GEARY & MCHOSE,

GORDON K. WRIGHT,

*Proctors for Appellant, Ace Tractor
& Equipment Company, Inc.*